

89-7260 (2)

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

WILLIAM J. BURNS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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SUPREME COURT, U.S.

**MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS**

The petitioner, William J. Burns, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit without prepayment of costs pursuant to Rule 39 of the Rules of the Supreme Court.

The United States District Court for the District of Columbia Circuit granted Mr. Burns In Forma Pauperis status on November 29, 1988, and the United States Court of Appeals for the District of Columbia Circuit appointed counsel pursuant to the Criminal Justice Act of 1964 on February 14, 1989.

Respectfully submitted,

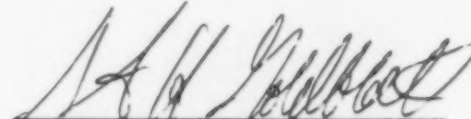

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one (1) copy of the foregoing Motion For Leave To Proceed In Forma Pauperis was mailed, postage prepaid, to counsel for Respondent, J. Douglas Wilson, Esquire, Appellate Section, Criminal Division, United States Department of Justice, Post Office Box 899, Ben Franklin Station, Washington, D.C. 20044 on this 19th day of April, 1990.


STEVEN H. GOLDBLATT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one (1) copy of the foregoing Motion For Leave To Proceed In Forma Pauperis was mailed, postage prepaid, to: Kenneth W. Starr, Esquire, Solicitor General of the United States, Department of Justice, 10th Street and Constitution Avenue, N.W., Room 5143, Washington, D.C. 20530 on this 19th day of April, 1990.


STEVEN H. GOLDBLATT

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No.

IN THE SUPREME COURT OF THE UNITED STATES
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WILLIAM J. BURNS,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a judge may impose a sentence that departs from the applicable guideline range of the Federal Sentencing Guidelines without giving the defendant notice of, and an opportunity to respond to, the intended departure and the factors on which the departure is based?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED1
TABLE OF CONTENTSii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES, GUIDELINES, AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
<u>Introduction</u>	8
THE PANEL OF THE DISTRICT OF COLUMBIA CIRCUIT HELD THAT A DEFENDANT IS NOT ENTITLED TO ADEQUATE NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD CONCERNING FACTORS FOR AN UPWARD DEPARTURE, THEREBY PLACING THE DISTRICT OF COLUMBIA CIRCUIT INTO DIRECT CONFLICT WITH THREE OTHER CIRCUITS AND MISAPPREHENDING FED. R. CRIM. P. 32 AND U.S.S.G. § 6A1.3.8
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
<u>CASES</u>	
<u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976)	14
<u>United States v. Burns</u> , 893 F.2d 1343 (D.C. Cir. 1990), <u>reh'g and reh'g en</u> <u>banc denied</u> , (D.C. Cir. March 15, 1990)	<u>passim</u>
<u>United States v. Cervantes</u> , 878 F.2d 50 (2d Cir. 1989)	12
<u>United States v. Burch</u> , 873 F.2d 765 (5th Cir. 1989)	14, 17
<u>United States v. Nuno-Para</u> , 877 F.2d 1409 (9th Cir. 1989)	12, 13, 15, 16
<u>United States v. Otero</u> , 868 F.2d 1412 (5th Cir. 1989)	12, 13, 15
<u>United States v. Palta</u> , 880 F.2d 636 (2d Cir. 1989)	13, 15
<u>United States v. Pugliese</u> , 805 F.2d 1117 (2d Cir. 1986)	14
<u>United States v. Romano</u> , 825 F.2d 725 (2d Cir. 1987)	13, 14
<u>STATUTES</u>	
18 U.S.C. § 3553 (1988)	17
United States Sentencing Commission, <u>Guidelines Manual</u> , § 6A1.3 (June 1988)	12, 14, 15, 16
United States Sentencing Commission, <u>Guidelines Manual</u> , Ch.6 Pt.6, intro. comment (June 1988).	14
Fed. R. Crim. P. 32	12, 13

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PETITION FOR A WRIT OF CERTIORARI TO THE
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, entered January 12, 1990, is reported at 893 F.2d 1343, and is reprinted in Appendix A, filed with this petition, at pp. 1-6. The order of the United States District Court for the District of Columbia, entered October 14, 1988, is an unpublished opinion, Crim. No. 88-0302 (D.D.C. October 14, 1988), and is reprinted in Appendix A at pp. 8-12.

JURISDICTION

On October 14, 1988, the District Court for the District of Columbia sentenced Mr. Burns to 60 months in federal prison. The district court's jurisdiction was based upon 18 U.S.C. §§ 3231

and 3551 (1988). The district court's order was affirmed by a panel of the United States Court of Appeals for the District of Columbia Circuit in an opinion entered on January 12, 1990. See United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990). The circuit court had jurisdiction over the appeal from final judgment under 28 U.S.C. § 1291 (1988) and 18 U.S.C. § 3742 (1988). Mr. Burns' petition for rehearing or rehearing en banc was denied on March 15, 1990.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES, GUIDELINES, AND RULES INVOLVED

The full text of the following relevant statutes, guidelines, and rules are contained in Appendix B, filed with this petition:

1. Fed. R. Crim. P. 32;
2. United States Sentencing Commission, Guidelines Manual, § 6A1.3 (June 1988);
3. United States Sentencing Commission, Guidelines Manual, Ch.6 Pt.6 intro. comment (June 1988);
4. 18 U.S.C. § 3553 (1988).

STATEMENT OF THE CASE

This petition for certiorari arises from William J. Burns' sentencing by the United States District Court for the District of Columbia under the Federal Sentencing Guidelines. The

district court's jurisdiction was based upon 18 U.S.C. §§ 3231 and 3551 (1988). Burns pleaded guilty to theft of government funds, in violation of 18 U.S.C. § 641 (1988), making false claims against the government, in violation of 18 U.S.C. § 287 (1988), and attempting to evade income tax, in violation of 26 U.S.C. § 7201 (1988). (App. A at 13).¹

On October 14, 1988, Judge Norma Holloway Johnson sentenced him to 60 months of incarceration, (App. A at 13-14), noting her upward departure from the applicable sentencing guideline range of 30-37 months. (App. A at 8-12). Burns appealed that departure from the applicable sentencing guideline range, (App. A at 2), claiming, *inter alia*, that he was entitled to notice of, and an opportunity to respond to, the district court's intention to depart from the applicable guideline range. *Id.* The Court of Appeals for the District of Columbia Circuit affirmed the sentence, (App. A at 1-7), and denied Burns' petition for panel rehearing and suggestion for rehearing *en banc*. (App. A at 16-17).

Burns was employed by the United States Agency for International Development ("AID") from 1967 to July, 1988. (App. C at 11). At the time of his arrest, he was a supervisor in the

¹ For the purposes of this petition, citations to "App. A" refer to Appendix A, which contains the opinions and orders of the lower courts in this case, citations to "App. B" refer to Appendix B, which contains the full text of relevant statutes, guidelines, and rules, and citations to "App. C" refer to Appendix C, which contains other relevant documents from the record in this case. All three appendices are bound together and were filed with this petition.

agency's Financial Management Section, *id.*, and as a certifying officer was authorized to order the Treasury to make payments to vendors on the agency's behalf. (App. C at 2). AID officials conducted a routine background check required to maintain Burns' security clearance in December, 1987. (App. C at 6). They became suspicious of Burns when they learned that his home was valued at over \$400,000, because his income was \$35,108. *Id.* The officials then conducted a credit check on Burns, and an investigation of his banking records. *Id.* Those records and a subsequent internal investigation revealed that Burns had diverted funds for his own use from an unused travel fund at AID. (App. C at 26).

From February 25, 1982, through May 26, 1988, Burns prepared false authorization forms for payments in the name of Vincent Kaufman, and submitted the forms to the United States Treasury. (App. C at 2). The forms instructed the Treasury Department to draw a check on an account allocated to AID, and send the check to the Signet Bank to be deposited in the name of Vincent Kaufman. *Id.* The Kaufman account was, in fact, Burns' account, and Burns withdrew money from the account for his personal use. *Id.* Over the six year period, the Treasury issued 53 such checks in response to Burns' fraudulent applications. (App. A at 9-11, App. C at 28). The total amount of the theft was \$1,261,184.92, (App. C at 7), and Burns' outstanding tax obligation on this unreported income is \$475,685. *Id.* After the agency investigation uncovered Burns' fraud, he submitted two additional

fraudulent forms to the Treasury, which, though never paid, constituted false claims against the government. (App. C at 2-3). He was arrested on July 12, 1988. (App. C at 1).

Burns negotiated a plea agreement with the Justice Department, in which he agreed to waive indictment and plead guilty to one count of theft of government funds, 18 U.S.C. § 641, one count of false claims, 18 U.S.C. § 287, and one count of attempting to evade income tax. 26 U.S.C. § 7201. (App. C at 15-17). He also agreed to cooperate with the government by submitting to debriefings regarding the money he obtained from the travel fund. (App. C at 16). Burns and his wife, Kathy Burns, agreed to make restitution by surrendering substantially all of their assets to the government. Id. Burns also cooperated fully with government authorities in identifying the property and money recoverable by the government. (App. C at 7). Under the plea and restitution agreements, (App. C at 15-17, 19-25), the government should receive between \$600,000 and \$700,000 from the transfer of that money and property. (App. C at 12).² Burns further agreed to surrender to the government 50% of any income he earns over \$40,000, and 100% of any income he earns over \$70,000, until he has repaid in full all money he obtained

² Mrs. Burns was permitted to retain the following: 1) property and funds that she could establish were not acquired directly from her husband or obtained with funds acquired from him, 2) one automobile, 3) \$10,000 in funds, less any property and funds retained because they were not acquired directly or indirectly from her husband, and 4) necessary household items, one wedding and engagement ring set, and wedding gifts. (App. 17).

from the agency's travel fund. (App. C at 22-23). The restitution agreement also divested Burns of all claim to his \$30,286 retirement fund. (App. C at 24). Finally, nothing in the plea or restitution agreements affects Burns' civil tax liability. (App. C at 17, 24).

The plea agreement noted that all parties "understood" that the case would be covered by the Sentencing Guidelines, and that each party "assumed that a sentencing range of Level 19, Criminal History Category I," would determine the sentence, i.e., would allow the judge a range of 30-37 months. (App. C at 15). In the presentence report, the probation officer also concluded that the applicable guideline sentencing range was 30 to 37 months. (App. C at 9). The probation officer concluded that the case involved "no factors that would warrant departure from the guideline sentence." (App. C at 13). Both Burns and the government reviewed the presentence report, and neither filed an objection. (App. C at 14).

At the sentencing hearing, after hearing from counsel and briefly from Burns, Judge Johnson agreed with the probation officer and with the parties that "[t]he guidelines which apply to this case do indeed reflect that the appropriate sentence is within the range of 30 to 37 months." (App. C at 27). However, the Judge went on to state that "the appropriate sentence can only be effected if the court departs from the guidelines." Id. She found that three factors were involved in the offense "which [she] [felt] the guidelines either fail to address or to consider

adequately." (App. C at 28). The court's findings with regard to those factors were that: 1) "the Guidelines, in considering the severity of the offenses, do not sufficiently weigh the duration of defendant's criminal activity," (App. C at 28); 2) Burns "disrupted the functions of government," (App. C at 30); and 3) "[b]y continually evading the payment of . . . taxes, [Burns] conceal[ed] crimes of theft and false claims." (App. C at 31). Judge Johnson then stated that:

The court relies upon its own judgment and experience and finds that the guideline range for the offenses which you committed must be departed from.

Pursuant to the Sentencing Reform Act of 1984, Mr. Burns, it is the judgment of this court that you shall be committed to the custody of the Bureau of Prisons for a term of 60 months.

(App. C at 31). The Judge also sentenced Burns to three years of supervised release following his 60 month incarceration, and to 100 hours of community service per year for each of the three years of the supervised release. (App. C at 31-32). After noting that Burns had agreed to a restitution agreement with the government, Judge Johnson informed him of his right to appeal and to appointed counsel, then ordered him to step back with the marshal. (App. C at 33).

Mr. Burns' petition to this Court follows the District of Columbia Circuit's affirmance of his sentence, (App. A at 1-7), and its denial of his petition for rehearing and suggestion for rehearing en banc. (App. A at 16-17).

REASONS FOR GRANTING THE WRIT

Introduction

The panel opinion in United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990), presents an important issue on which this Court should grant a writ of certiorari. The panel rejected Mr. Burns' argument that, prior to sentencing, a defendant must receive notice of, and an opportunity to respond to, a district court judge's intention to depart from the guideline range applicable under the Federal Sentencing Guidelines. See United States Sentencing Commission, Guidelines Manual, ("U.S.S.G.") (June 1988). In so doing, the panel misapprehended the requirements of Fed. R. Crim. P. 32 and U.S.S.G. § 6A1.3 and thereby placed the District of Columbia Circuit into direct conflict with the three Circuits that have previously ruled that such notice is required. Burns, 893 F.2d at 1348.³ For this reason, this Court should grant a writ of certiorari in this case.

THE PANEL OF THE DISTRICT OF COLUMBIA CIRCUIT HELD THAT A DEFENDANT IS NOT ENTITLED TO ADEQUATE NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD CONCERNING FACTORS FOR AN UPWARD DEPARTURE, THEREBY PLACING THE DISTRICT OF COLUMBIA CIRCUIT IN CONFLICT WITH THREE OTHER CIRCUITS AND MISAPPREHENDING FED. R. CRIM. P. 32 AND U.S.S.G. § 6A1.3.

The panel's conclusion that a notice requirement "is not

³ See United States v. Otero, 868 F.2d 1412, 1415 (5th Cir. 1989); United States v. Nuno-Para, 877 F.2d 1409, 1415 (9th Cir. 1989); United States v. Cervantes, 878 F.2d 50, 55 (2d Cir. 1989); see also United States v. Palta, 880 F.2d 636, 640 (2d Cir. 1989).

contemplated by Rule 32," Burns, 893 F.2d at 1348, misapprehends Fed. R. Crim. P. 32 and rejects the interpretation of three other Circuits. Id. at 1348. Under Rule 32, counsel must have an opportunity at the sentencing hearing, "to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Fed. R. Crim. P. 32(a)(1) (emphasis added). Three Circuits have held that "other matters relating to the appropriate sentence" include both the court's intention to depart from the applicable guideline range and the factors and circumstances that underlie the intended departure. See Otero, 868 F.2d at 1415; Nuno-Para, 877 F.2d at 1415; Palta, 880 F.2d at 640. Therefore, where a presentence report does not give a defendant notice of a potential departure,⁴ but the judge intends to depart, "the court must advise the defendant that it is considering departure based on a particular factor and allow defense counsel an opportunity to comment." Nuno-Para, 877 F.2d at 1415. If counsel has no such opportunity, "the purpose of Rule 32(c), to ensure the accuracy of sentencing information, would be defeated." Otero, 868 F.2d at 1415.⁵

⁴ Under Rule 32 the probation officer must explain in the presentence report "any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances." Fed. R. Crim. P. 32(c)(2)(B).

⁵ Given that Congress has mandated these defendants' rights to challenge matters related to the appropriate sentence, Fed. R. Crim. P. 32(a)(1), the court's deprivation of Burns' right to this challenge constituted a violation of procedural Due Process. See United States v. Romano, 825 F.2d 725, 728 (2d Cir. 1987). That the amount of process due a defendant to protect this right must include adequate notice of and a meaningful opportunity to

While the opinion below correctly notes that requiring district courts to give this type of notice to defendants would constitute a deviation from pre-Guidelines practice, see Burns, 893 F.2d at 1348, it overlooks the Commission's initiation of this type of change. See U.S.S.G. § 6A1.3, comment.

In current practice factors relevant to sentencing are often determined in an informal fashion . . . this situation will no longer exist under the Sentencing Guidelines. The court's resolution of disputed factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair []. . . . When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information.

Id. (emphasis added). Part of this new formality must include a meaningful opportunity for the defendant to challenge disputed factors regarding a court's reasons for considering departure, because resolution of such disputes helps to ensure the fairness, accuracy, and uniformity of sentencing. See U.S.S.G. Ch.6, Pt.6, intro. comment ("[r]eliable fact finding is essential to due process and to the accuracy and uniformity of sentencing");

respond to the court's intention to depart, is clear from an application of the four part balancing test of Mathews v. Eldridge, 424 U.S. 319, 335 (1976). See Romano, 825 F.2d at 728 (applying Mathews test to determine process due at sentencing hearing); United States v. Pugliese, 805 F.2d 1117, 1122 (2d Cir. 1986) (same). First, the defendant's liberty interest is clearly quite strong. Further, the risk of error associated with the procedure used in this case and the value of allowing defendants to challenge sentencing information are both recognized by the Rule 32 and Guideline § 6A1.3 provisions for testing the accuracy of sentencing information. Finally, because resolution of the disputed factors below will afford greater accuracy in sentencing, the government's fiscal interest would be served by more efficient, and probably fewer, appeals.

United States v. Burch, 873 F.2d 765, 767 (5th Cir. 1989) (sentencing court failed to comply with Rule 32(c) and § 6A1.3 by not resolving defendant's factual disputes regarding presentence report).

The extent of the new procedures for resolution of disputed sentencing factors that the Sentencing Commission embodied in § 6A1.3 indicates that the Commission anticipated the notice requirement that three Circuits have upheld. See Otero, 868 F.2d at 1415; Nuno-Para, 877 F.2d at 1415; Palta, 880 F.2d at 640.

The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), . . . notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

. . . .

Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues.

U.S.S.G. § 6A1.3, p.s.; U.S.S.G. § 6A1.3 comment. See also Otero, 868 F.2d at 1415 (remanding for a hearing regarding purity of cocaine). Once the parties receive notice of a judge's intention to depart, a judge should resolve any dispute over the factors underlying the intended departure by following these Guideline procedures. The panel opinion rejects this type of presentence procedure as a means to address a judge's intent to depart because it would be a "cumbersome burden on trial judges." Burns, 893 F.2d at 1348. However, § 6A1.3 emphasizes the importance of resolution of disputed factors prior to sentencing, and obligates judges to take steps necessary to that end.

Further, in terms of judicial economy, any "cumbersome" nature of this type of proceeding pales in comparison to the inefficiency of unnecessary appellate review and potential remands for resolution of disputed factors.

The panel opinion also notes that because Burns had an opportunity for allocution and appeal, "he has not been harmed by the trial court's lack of notice." Burns, 893 F.2d at 1348. This view overlooks both the express intention of the Sentencing Commission that any disputed sentencing factor be resolved by the district court before sentencing, U.S.S.G. § 6A1.3, and the limitations on relief available that appellate standards of review necessarily impose. First, in allocution, counsel can only challenge the factors on which a defendant's sentence is based if he or she knows of that basis, i.e., of any intent the judge has to depart and the grounds for that departure. The mere fact that the information on which the court relied as a basis for upward departure was present in the presentence report, see Burns, 893 F.2d 1348, neither satisfies the Rule 32 requirements nor allows defendants to protect themselves through allocution. "Rather, such information . . . must be identified as a basis for departure in the presentence report," or the judge must provide the defendant with reasonable notice of that information. Nuno-Para, 877 F.2d at 1415.

Second, only if a Court of Appeals were to review de novo the facts underlying the factors upon which departure is based, as well as the factors themselves, and then exercise the broad

discretion of a sentencing court in evaluating the length of the sentence, 18 U.S.C. § 3553 (1988), could the defendant's right to appeal the district court's departure afford the same opportunity to challenge the grounds for departure lost in the district court. Contrary to the panel opinion's assertion, Burns, 893 F.2d at 1348, Burns disputes facts underlying the departure in this case. Specifically, he disputes that his actions resulted in the disruption of a governmental function. (App. C at 34-43). On appeal he was unable to challenge the factual basis in the record for departure on that ground in the same way that he could during a presentence procedure. Under the panel's rule, disputes like this one will remain unresolved on appeal, preventing the Court of Appeals from "gaug[ing] either the need for or reasonableness of the departure." Burch, 873 F.2d at 767.

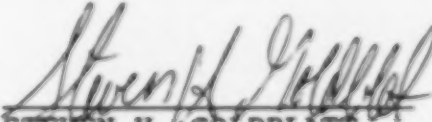
The District of Columbia Circuit has established a rule that fails to advance the purposes of the Federal Rules of Criminal Procedure, ignores the changes in sentencing procedure instituted by the Sentencing Guidelines and thereby violates defendants' rights to procedural Due Process. See supra note 5. The Circuit's justifications for its rule, *i.e.*, that any new proceeding would be cumbersome and that the defendants' opportunities for allocution and appeal are sufficient opportunities to challenge any departure from an applicable guideline range, fail to cure the harm done to defendants. The

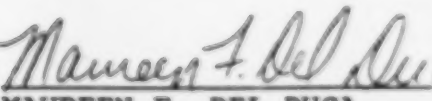
Second, Fifth, and Ninth Circuits⁶ have, contrary to the District of Columbia Circuit, established departure notification rules that fulfill the purposes of the Federal Rules of Criminal Procedure and the Sentencing Guidelines, and protect defendants' procedural Due Process rights. This Court should resolve this split in the Circuits so that all federal defendants will receive the same protections when district judges intend to depart from an applicable guideline range.

CONCLUSION

The petitioner respectfully requests that this Court grant the writ of certiorari and review the decision of the District of Columbia Circuit in this case.

Respectfully submitted,


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⁶ See United States v. Otero, 868 F.2d 1412, 1415 (5th Cir. 1989); United States v. Nuno-Para, 877 F.2d 1409, 1415 (9th Cir. 1989); United States v. Cervantes, 878 F.2d 50, 55 (2d Cir. 1989); see also United States v. Palta, 880 F.2d 636, 640 (2d Cir. 1989).

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